No. 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees,

STATE OF NEW JERSEY,

Intevenor.

ON APPEAL FROM THE FINAL ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF APPELLANTS

THEODORE SACHS
I. MARK STECKLOFF
Of Counsel
MARSTON, SACHS, NUNN, KATES, KADUSHIN & O'HARE, P.C.
1000 Farmer,
Detroit, Michigan 48226
(313) 965-3464

MICHAEL S. SCAROLA,
GELMAN & GELMAN,
Counsel for Appellants,
45 Church Street,
Paterson, New Jersey 07505
(201) 523-8050

Appeal Docketed June 19, 1980
Probable Jurisdiction Noted November 3, 1980

THE INLAND PRESS, DETROIT, MICHIGAN
105

TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	ii, iii, iv, v
INTRODUCTION/SUMMARY OF ARGUMENT	1
I. THE ARGUMENTS OF APPELLEES, RESPONDENT AND THEIR *AMICI CURIAE* WITH REGARD TO ERISA §203(a) ARE WITHOUT MERIT.	3
A. Defendants' asserted distinction between "claim" and "benefit," and its "under the plan" argument contravene the clear language, history and purposes of ERISA	3
B. The antidiscrimination provisions of the tax code do not sanction forfeitures under §203(a) of ERISA	7
C. Treasury Regulation §1.411(a)-4(a) is unavailing to defendants	11
D. Defendants' other arguments are without merit	16
II. THE PREEMPTION ARGUMENTS OF APPELLEES, RESPONDENT AND THEIR *AMICI CURIAE* ARE WITHOUT MERIT	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page

Cases Cited:

Alessi v *Raybestos-Manhattan*, Civ. No. 78-9434 (D. N.J. 1979) 15

Amory v *Boyden Associates*, 434 F. Supp. 671 (S.D. N.Y. 1976) 10

Bonar v *Barnett Bank of Jacksonville*, 488 F. Supp. 365 (M.D. Fla. 1980) 2

Bordine v *Evans Product Company*, 453 F. Supp. 19 (E.D. Mich 1978) 5

Carlson v *Bundy Manufacturing Corporation*, Civ. No. 6-72274 (E.D. Mich 1977) 5, 15

Dotson v *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation*, Civ. No. 79-73728 (E.D. Mich 1980) 3, 5, 15

Employee Benefits Committee of the Retirement System of Hawaiian Telephone Co., v *Pascoe*, — F. Supp. —, No. 78-0483 (D. Hawaii, 1980) 7, 15, 18

Fremont v *McGraw-Edison Co.*, 606 F. 2d 752 (7th Cir. 1979) 2, 10

Fultz v *Union Carbide Corp.*, 219 Tenn. 345, 409 S.W. 2d 541 (1966) 15

Keller v *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005 (N.D. Ohio, 1976) 6, 8, 9

Lewis v *Merrill Lynch, Pierce, Fenner & Smith*, 431 F. Supp. 271 (E.D. Pa. 1977) 10

Massey v *D.C. Transit Sys., Inc.*, 388 F. 2d 584 (D.C. Cir. 1967) 15

Nachman Corporation v *Pension Benefit Guaranty Corporation*, 466 U.S. 359, 64 L. Ed. 2d 354, S. Ct. (1980) 3-4, 16

Paterson v *Southwestern Bell Telephone Co.*, 411 F. Supp. 79 (E.D. Okla. 1976) 15

Pavlovic v *Chrysler Corporation*, CA No. 7-70438 (E.D. Mich 1978) 15

Page

Renshaw v *U.S. Pipe & Foundry Co.*, 30 N.J. 458, 153 A. 2d 673 (1959) 15
Richardson v *Belcher*, 404 US 83, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971) .....
Riley v *M.E.B.A. Pension Trust*, 570 F. 2d 406 (2d Cir. 1977) 2, 7, 10
The Rochester Corporation v *Rochester*, 450 F. 2d 118 (4th Cir. 1971) 9
Standard Oil Company of California v *Agsalud*, 442 F. Supp. 965 (N.D. Cal. 1977), *affirmed*, 633 F. 2d 760 (9th Cir. 1980) 19
Stong v *Bucyrus-Erie*, 472 F. Supp. 1089 (E.D. Wis. 1979), appeal pending No. 80-1755 (7th Cir.) 6, 7, 15
Swift v *Shop Rite Food Stores, Inc.*, 489 P. 2d 881 (N.M. S. Ct. 1971) 9
Utility Workers Union of America v *Consumers Power Co.*, — F. 2d — No. 78-1402 (6th Cir. Jan. 6, 1981), petition for reh. en banc den. Feb. 13, 1981 1, 4, 5, 15, 16, 17
Winer v *Edison Brothers Pension Plan*, 593 F. 2d 307 (8th Cir. 1979) 10

Statutes Cited:

Employee Retirement Income Security Act (ERISA):
§3(19), 29 U.S.C. §1002(19) 5, 6
§3(23), 29 U.S.C. §1002(23) 5
§4(b)(3), 29 U.S.C. 1003(b)(3) 2-3, 18, 19
§105, 29 U.S.C. §1025 5
§203(a), 29 U.S.C. §1053(a) 2, 3-7, 9, 17
§203(a)(3)(B), 29 U.S.C. §1053(a)(3)(B) 2, 6-7
§203(c)(2), 29 U.S.C. §1053(c)(2) 9
§206(b), 29 U.S.C. §1056(b) 12
§206(c), 29 U.S.C. §1056(c) 12
§209(a), 29 U.S.C. §1059(a) 5
§211(b)(2), 29 U.S.C. §1061(b)(2) 2
§514(a), 29 U.S.C. §1144(a) ..... 2 ,3 ,17-18

Page

§514(b), 29 U.S.C. §1144(b) 3
§§3021-3031, 29 U.S.C. §1221-1231 .....
Internal Revenue Code of 1954, as amended:
§401(a)(5), 26 U.S.C. §401(a)(5) 11, 12, 13, 14
§401(a)(7), 26 U.S.C. §401(a)(7) .....
§401(a)(15), 26 U.S.C. §401(15) 12
§411(d)(2), 26 U.S.C. §411(d)(2) 9
Internal Revenue Code of 1939, as amended:
§165 (a)(5) 13-14
Longshoremen's and Harbor Worker's Compensation Act:
§15, 33 U.S.C. §915 15
Revenue Act of 1942, as amended, c. 619, 56 Stat. 798:
§162(a) 13-14
Welfare and Pension Plans Disclosure Act:
§4(b)(2), 29 U.S.C. §303(b)(2) 19

Regulations Cited:

Department of Labor:
29 C.F.R. §230, 230-3, January 26, 1981 7
Treasury Reg.:
Regulation 111, §§29.165-3 and 29.165-4 14
26 C.F.R. §1.401-4(b) (1956) 11, 13, 14
26 C.F.R. §1.411-4(a) (1977) 11-15
29 C.F.R. §1.411(a)-4(c) 9

Rulings Cited:

Revenue Ruling 82, C.B. 1953-1, 288 10
Revenue Ruling 61-147, I.R.B.,1961-32 12
Revenue Ruling 68-243, I.R.B., 1968-1 ..... 8, 11
Revenue Ruling 69-421, C.B. 1969-2, p. 59 8
Revenue Ruling 70-317 I.R.B. 1970-25 .....10, 11
Revenue Ruling 71-92, I.R.B. 1971-7 ..... 9, 10, 11

Page

Legislative History:

Employee Retirement Income Security Act (ERISA):

H.R. Rept. 93-533 (Educ. & Labor Committee) 4, 12
H.R. Rept. 93-779 (Ways & Means Committee) ... 5, 8, 9
H.R. Rept. 93-807 (Ways & Means Committee) . 5, 10, 12
Remarks of Rep. Dent, III Leg. Hist., at 4671 19
Remarks of Rep. Perkins, II Leg. Hist. 3293, 3388 5
Remarks of Rep. Ullman, II Leg. Hist. 3324, III Leg. Hist. 4673 ..... 8, 12
S. Rept. 93-383 (Finance Committee) 7-8, 10
Remarks of Sen. Javits, III Leg Hist. at 4772 7
Remarks of Sen. Williams, III Leg. Hist. at 4736 ... 5, 12
H.R. Rept. 93-1280 (Joint Conference Committee) . 3, 8, 9

Revenue Act of 1942

H.R. Rept. No. 2333 14

Welfare and Pension Plans Disclosure Act

S. Rept. No. 1440 (Labor and Public Welfare Committee) 11

Bills Cited:

H.R. 2, 93d Cong., 1st Sess. 2
S. 4, 93d Cong., 1st Sess. 3

Miscellaneous:

Hays Associates, Analysis of Pension Plans/Workers' Compensation Offsets; Final Report, April 13, 1979

I.R.S. Publication 778 ..... 8, 9, 10

No. 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees,

STATE OF NEW JERSEY,

Intevenor.

ON APPEAL FROM THE FINAL ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF APPELLANTS

INTRODUCTION/SUMMARY OF ARGUMENT

> " '[T]o hold that any forfeiture or suspension of benefits is permissible so long as it is sanctioned by the [pension] plan is to turn [ERISA's] entire statutory scheme upon its head.' " . . . If this Court were to accept the reasoning of defendants, a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into its pension plan's computation procedures. Such result, however, would be contrary both to the provisions and to the spirit of ERISA." *Utility Workers Union of America* v. *Consumers Power Co.*, —F.2d—, No. 78-1402 (6th Cir. Jan. 6, 1981), petition for reh. en banc den. Feb. 13, 1981.

Invoking "integration" as a talisman to conceal the reality of an employee's permanent loss of all or a part of his pension benefits;

Inferring from Congress' agonizing, temporary approval of limited Social Security integration, a clear intent to sanction all other practices causing the loss of part or all of a participant's pension benefits;

Conceding a "right" and a "claim" to which no "benefit" is attached — despite respondent's acknowledgment (Brief, 13) that "obviously, the 'claim' cannot exist without the 'benefit' ";

Relying on a "legislative regulation" analysis which was central to the decision below but which is now repudiated by its intended beneficiary;

Disregarding the missing ingredient of that regulation which the Sixth Circuit has ruled is necessary, i.e., the correlation of like "*retirement*" benefits;

And making arguments which prove altogether too much under both the tax code and ERISA,

Appellees, respondent and their *amici*, despite seven briefs totalling 208 pages, have failed utterly to meet the central argument of appellants and petitioners — that the clear language, history and purpose of ERISA plainly prohibit the loss of an employee's rights to his vested retirement benefits under any circumstance, except those specifically permitted in the Act.

What these briefs demonstrate clearly is defendants' serene but erroneous perception of ERISA as but another amendment to the tax code: that except for a limited list of explicit changes in the substantive law, Congress, on enacting the Pension Reform Act "intended that pre-ERISA practices would continue in effect"[1] in all other areas.

As we presently demonstrate, however, defendants may not rely on semantic incantations and the pre-ERISA *status quo* to legitimize abuses plainly and directly forbidden by ERISA, a statute which *amicus* United States otherwise acknowledges "announces a fundamental principle of nonforfeiture of pension benefits." (Brief, 13).

As we further show *infra*, part II, defendants and their *amici* have in their broad preemption arguments simply ignored the clear exception from the coverage of ERISA in §4(b)(3) for plans maintained to comply with "applicable workmen's compensation laws." As courts recently considering the issue have concluded, if a law relating to a plan maintained to comply with a workmen's compensation law is not preempted by ERISA, §514(a), then *a fortiori*, the workmen's compensation law itself cannot be preempted.[2]

---

[1]Brief of *amicus* U.S. Chamber of Commerce, p. 11.

[2]Appellees (Brief, p. 6, n. 4) and respondent (Brief, p. 6, n. 1) assert, without citing the relevance thereof, that §203(a) is inapplicable to forfeitures occurring after its effective date to individuals retiring prior thereto. No issue in that regard in these removed cases was asserted below by appellee Raybestos; nor is it relevant as to respondent General Motors, where petitioners are a certified class including both persons who retired before and after such effective date. Order of August 9, 1978, J.A. 52a. In any event, authority recognizes the application of §203(a) to pre-ERISA retirees as to post-effective-date benefits, in analogous circumstances (here, a post-effective date suspension-forfeiture of otherwise undisputed benefits). *Riley* v. *MEBA Pension Trust*, 570 F. 2d 406 (2d Cir. 1977) (post-ERISA "suspension" of benefits on account of pre-ERISA retiree's reemployment outside of "industry"; held prohibited by §203(a)(3)(B)); *Bonar* v. *Barnett Bank of Jacksonville*, 488 F. Supp. 365 (M.D. Fla. 1980) (post-effective-date "suspension" of benefits on account of pre-ERISA retiree's violation of non-competition clause; held prohibited by §203(a). Reasoning of *Fremont* v. *McGraw-Edison Co.*, 606 F. 2d 752 (7th Cir. 1979), expressly rejected, and other authorities approved, 488 F. Supp. 370, n. 7). That construction accords with the

I.
THE ARGUMENT OF APPELLEES, RESPONDENT AND THEIR *AMICI CURIAE* WITH REGARD TO ERISA §203(a) ARE WITHOUT MERIT.

A. Defendants' asserted distinction between "claim" and benefit," and its "under the plan" argument contravene the clear language, history and purposes of ERISA.

Relying heavily on the Court's statement in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 372-373, 64 LEd. 2d 354 (1980), that the phrase "nonforfeitable" may be viewed as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect," defendants argue that, in consequence, no forfeiture can occur whenever the "limit on the amount" of the benefit collected is provided for in the plan itself. (Brief of respondent, 13; Brief of appellees, 10-11). Defendants urge that while it is unlawful to cancel a participant's claim to his pension, it is perfectly lawful to cancel the entire benefit to which his claim attaches.

However, entirely unlike the instant case, the limit on the collectible amount in *Nachman* arose not from any provision of the plan, which remained fully liable to pay all vested benefits, but from insufficiency of the plan assets — the routine uncollectibility situation. As respondent acknowledges (Brief, 13), "the 'limit' on the benefit amount receivable . . . in *Nachman* was the limit imposed by the adequacy of plan assets," as distin-

---

statutory language of §211(b)(2), 29 U.S.C. 1061(b)(2), which provides for the application of §203(a) to *plan years* beginning after December 31, 1975. (The reliance by the District Court in *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation*, Civ. No. 79-73728 (E.D. Mich. 1980) (Appendix to Brief of Respondent, 16a), on purported legislative history to the contrary, is misplaced; the District Court erroneously cited legislative history to proposed S. 4, rather than later-adopted H.R. 2, whose conference report focused on the effective date of the *plan year* rather than the date of the employee's separation. H.R. Conf. Rept. 93-1280, [1974] U.S. Code Cong. & Admin. News 5038, 5048-5049.) Finally, and in any event, to the extent that pre-ERISA claims are not covered by the Act, they are expressly exempted from preemption by §§514(a) and (b), 29 U.S.C. §1144(a) and (b).

guished from the plan itself.[3] Here, however, the vested benefits of plaintiff pensioners are fully collectible, but for the plan provision conditioning receipt of such benefits upon forgoing receipt of worker's compensation for their on-the-job injuries.

Defendants' reasoning would make the comprehensive "Pension Reform Act" a cruel illusion. Rather than "assure that workers now covered by pension plans get their respective benefits"[4] and make "sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — that he actually receive it,"[5] ERISA would become a guarantee of nothing. Any and all forms of benefit losses could become sanctioned "under the plan." And whether denominated "integration," "offset," or "forfeiture," the reality for the pensioner would be precisely the same: he would not receive an expected pension benefit, which he had earned with his long years of service, for which he had forgone current compensation during his work career, and which had long since "vested" and become "nonforfeitable."

Indeed, a whole host of forfeitures would be legitimized by defendants' analysis, including "offsets" for savings from an employee's bank account, or for interest on his investments, or against other collateral earnings. Worst yet, the benefits derived from an employee's *own* contributions could be "offset" against worker's compensation without their being "forfeited." As the Sixth Circuit stated, the argument "proves too much."

---

[3]Indeed, four of the justices believed even this provision placed a condition on plan benefits which would have become void upon the effective date of the minimum vesting standards. *Id*, at 69 L. Ed. 2d 354-355, n. 8.

[4]H.R. Rept. 93-533 (Education and Labor Committee), Supplemental Views of Reps. Quie, Ashbrook, Edenborn, Eshelman, and Hausen, reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4666.

[5]*Nachman* v. *Pension Benefit Guaranty Corp*, *supra*, 100 S. Ct. at 1733. The Sixth Circuit in *Utility Workers* stated: "In the Act, Congress intended to provide these employees with guarantees that, after they had completed certain required years of service, they would gain unconditional and non-forfeitable rights to fixed pension benefits." (Slip Op., 9).

Utility Workers Union, supra, Slip. Op., 7. [6]

Congress was concerned about this very problem, of insuring that vesting provided a meaningful benefit. The House Ways and means Committee twice stated:

> "*Accrued benefits* — Under the committee bill, the vested employee is protected in his rights to all, or a certain percentage, of his 'accrued benefit.' It is necessary to provide a statutory definition of an 'accrued benefit' because, unless this is a defined amount, vesting of an 'accrued benefit' in whatever form is specified by the plan has little, if any, meaning."[7]

Congress responded to these concerns — apart from the vesting and antiforfeiture requirements — by providing a *statutory* definition of the "accrued benefit," ERISA §3(23). Thus, Congress clearly did regulate the benefit amount which would vest under §203(a).

Accrued benefits are determinable at *any* time, and the Act provides mechanisms for informing employees as to the precise amount of accrued and nonforfeitable pension benefits to which they are entitled at any given time. ERISA §§105 and 209(a). Plainly, any reduction of this amount, once vested and nonforfeitable, frustrates the very purpose of the Act to define an amount (including Social Security integration) which a participant can justifiably expect to receive upon retirement and to plan accordingly.

Moreover, as the Sixth Circuit noted in *Utility Workers,* under §3(19), the nonforfeitable claim is to "that part of an immediate or deferred benefit under a pension plan *which arises from the participant's service.*" Slip Op., 18 (Emphasis in original). It is this service-based benefit — as distin-

---

[6]The Sixth Circuit decision in *Utility Workers,* of course, overrules every case relied on by defendants except the Third Circuit's here, including *Bordine, Pavlovic, Dotson,* and *Carlson* (*already* previously overruled).

[7]Rep. No. 93-807, 93rd Cong. 3d Sess, at 60, II Leg. Hist. at 3180, and Rep. No. 93-779, 93d Cong. 2d Sess, at 59, II Leg. Hist. at 2648. Similarly see Remarks of Sen. Williams, III Legislative History of the Employee Retirement Income Security Act of 1974 (hereafter, "Leg. Hist.") at 4736; and Rep. Perkins (House Education and Labor Committee), II Leg. Hist. 3293, 3328.

guished from the various "ancillary benefits" not part of the "normal retirement" or "accrued" benefit — which cannot be diminished upon vesting or attainment of normal retirement age.

Equally fundamental, fulfillment of the claim to these benefits must be "unconditional" (§3(19)). Forebearance of worker's compensation clearly conditions the receipt of the pension benefits here.[8]

Respondent concedes (Brief, 14) that §203(a) of ERISA prohibits the loss of pension benefits by operation of a plan "bad boy" provision, citing *Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005, 1008, (N.D. Ohio, 1976). In the same breath, however, it asserts that ERISA would sanction precisely the same result if a plan simply suspended monthly pension payments during the period the employee worked for the competitor — in the same fashion that it now suspends the entire benefit during plaintiffs' receipt of worker's compensation. This is so, defendants maintain, because now the forfeiture provision no longer cancels the participant's *claim* to his benefit (unlawful) but cancels the benefit itself (lawful). This is benefit "integration" (lawful), not benefit "loss" or "forfeiture" (unlawful).[9]

The fallacy of defendants' argument is graphically illustrated by ERISA §203(a)(3)(B), which provides an exception to the antiforfeiture requirement for *suspensions* of benefits during periods of re-employment with a narrowly-defined set of

[8]On this point, the District Judge in *Employee Benefits Committee* v. *Pascoe*, —— F. Supp. ——, No. 78-0483 (D. Hawaii, Dec. 15, 1980), quoting *Stong* v. *Bucyrus-Erie Co.*, 472 F. Supp. 1089 (E.D. Wis. 1979), appeal pending 7th Cir., No. 80-1755, held: "I think it would be an unreasonable interpretation of ERISA and contrary to its spirit to conclude that Congress injected another trade-off into this intricate scheme, forcing an employee with a work-related injury to forego the relief provided by statute for such injury in order to preserve his retirement benefits. Clearly, the nonforfeitability rule, with its narrowly defined and carefully delimited exceptions, was aimed at precluding such a harsh dilemma." (Slip Op., 13).

[9]The same "bad boy" clause could also operate to suspend or forfeit only a *portion* of an employee's vested benefit, see *infra*. 10, n.25, while still preserving his "claim" to the reduced amount — a situation defendants do not address.

employers. Only under the conditions enumerated therein is the suspension precluded from being deemed an impermissible forfeiture. *Riley* v. *MEBA Pension Trust*, 570 F. 2d 406 (2d Cir. 1977); Labor Department Regulation, 29 CFR §2530.230-3, filed January 26, 1981, reprinted at 326 BNA Pension Reporter, at R-26.[10] Yet under defendants' analysis, the sub-section is redundant or superfluous, for the same result could be obtained — as it was pre-ERISA — "under the plan."

In sum, defendants ask the Court, in the words of Judge Gordon in *Stong* v. *Bucyrus-Erie Co.*, 472 F. Supp. 1089, 1093 (E.D., Wisc 1979), "to conclude that, in the course of enacting a comprehensive remedial statute for the protection of the rights of workers to their earned retirement benefits, benefits which are essentially deferred compensation for services rendered, Congress left a gaping hole in its handiwork, allowing these benefits to be reduced proportionately when a retired worker successfully asserts a worker's compensation claim." As he and the Sixth Circuit concluded, it did not. *Accord*, *Employee benefits Comm.* v *Pasco*, No. 78-0483 (D. Hawaii, 1980)

B. The antidiscrimination provisions of the tax code do not sanction forfeitures under §203(a) of ERISA.

Defendants argue that worker's compensation offsets were permitted by the drafters of ERISA because the tax code antidiscrimination rules — which, defendants submit, properly permitted worker's compensation offsets[11] — "were not changed by ERISA." (Brief of appellees, 25).[12]

---

[10]As Sen. Javits stated, the provision is a "limited exception to what is generally a rule precluding divestiture of vested benefits . . ." III Leg. Hist. at 4772.

[11]This assertion, for whatever it is worth, is glaringly incorrect, as we demonstrated in our initial brief, pp. 28-38.

[12]And see Brief of Respondent, 15-25; Brief of *Amicus* United States 20-22. Defendants cite absolutely nothing in the legislative history to evidence specific Congressional examination, or even awareness, of worker's compensation offset practices. Indeed, as defendants concede, only one of the four committees drafting ERISA even once made the most tenuous reference to any publication that mentioned such practices, but only "in an unrelated context" (Brief of respondent, 21, n. 30) — to explain its understanding of the then existing law of fiduciary responsibility and prohibited

(continued)

Defendants' citation of the Conference Committee Report[13] to the effect that existing antidiscrimination requirements were not changed by ERISA, is unavailing.[14] First, the Committee clearly states: "Moreover, the conferees intend that the antidiscrimination rules of present law in areas *other than the vesting schedule* are not to be changed." (Emphasis added). Thus, the ERISA-added requirements relating to the time at which an employee's pension benefits were to become nonforfeitable would apply even where antidiscrimination rules would require — not merely not prohibit (as here) — a different result.

Second and most fundamentally, *Congress plainly intended*[15] *that*, regardless of the continued status of existing antidiscrimination law, *the new vesting and nonforfeitability standards of ERISA and the Code were separate, new requirements which every pension plan would henceforth have to satisfy independently of, and in addition to, its obligations under the antidis-*

---

transactions. S. Rep. No. 93-383, 93d Cong. 1st Sess., at 94 (1973), I Leg. Hist. at 1162. Significantly, Congress never cited IRS Publication 778, much less Rev. Rul. 68-243 and Rev. Rul. 69-421, to state its understanding of pre-ERISA antidiscrimination practices.

[13]Conf. Rep. 93-1280, 93rd Cong. 2d Sess, 276-77 (1974), III Leg. Hist. 4277, 4543-44.

[14]Brief of respondent, 21-22; Brief of *amicus* United States, 21-22; Brief of Appellees, 25-26 (pointedly omitting reference to the Conference Committee exception for "areas other than the vesting schedule").

[15]Thus, Rep. Ullman, one of the primary draftsman of ERISA, in describing the Conference Committee substitute bill, stated:

> "As under prior law, in order to qualify for this favorable tax treatment, pension plans will have to satisfy the present rules in the Internal Revenue Code designed to limit the favorable treatment to plans which do not discriminate in favor of highly paid employees as compared to the rank and file employees. However, under this legislation, to secure this favorable tax treatment, *plans will also have to satisfy additional requirements* which are designed to make them a more effective means of providing retirement income. *These new requirements* pertain to coverage, *vesting*, funding, fiduciary requirements, and plan termination insurance." (Emphasis added). III Leg. Hist. 4673.

See also, II Leg. Hist., 3324; III Leg. Hist. 3415; House Ways & Means Rep. No. 93-779, 93d Cong., 2d Sess, at 53 (1974), II Leg. Hist. at 2642; and Sen. Finance Committee Rep. No. 93-383, 93d Cong., 1st Sess., at 2, I Leg. Hist., at 1070.

crimination provisions of the Code.[16]

In the final analysis, defendants' antidiscrimination argument proves too much, because had all Code antidiscrimination rules been saved "with respect to coverage . . . contributions and benefits" to the *preemption* of vesting-antiforfeiture standards which might be higher in some instances, nothing would have changed, and a whole host of forfeitures not prohibited by the antidiscrimination provisions would still remain in effect. But, as defendants concede, this is simply untrue:

—Forfeitures for engaging in competitive employment, formerly permitted,[17] are prohibited by §203(a).[18]

—"Bad boy" forfeitures for any clearly stated cause, including misconduct, disloyalty, or dishonesty, formerly permitted,[19]

---

[16]Indeed, even where the antidiscrimination provisions of the Code required a particular result which might conflict with the new vesting-antiforfeiture requirements, Congress was manifestly explicit in the few instances where it intended the antidiscrimination requirements to preempt the vesting-antiforfeiture standards. For example, existing antidiscrimination rules required that upon early plan termination, plan benefits were required to be distributed in such a manner as not to discriminate in favor of officers, shareholders, or highly compensated employees, even if this required a highly compensated employee to receive less than his otherwise vested plan benefit. To make clear that the receipt of less than the full vested benefit, where necessary to prevent discrimination, was not to be considered a forfeiture in violation of §203(a), Congress provided in ERISA §203(c)(2) and IRC §411(d)(2) that:

> "(2) Subsection (a) shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations presecribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1954."

Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess, at 277-278, reprinted in III Leg. Hist. at 4544-4545; House Ways and Means Comm. Rep. No. 93-779, 93d Cong., 2d Sess, at 63-64, reprinted at II Leg. Hist. 2652-2653; Sen Finance Com. Rep. No. 93-383, 93d, Cong, 1st Sess., at 50, reprinted in I Leg. Hist. at 1118.

[17]IRS Pub. 778, Part 5, P-H pension and Profit Sharing ¶107,000. *The Rochester Corporation* v. *Rochester*, 450 F. 2d 118 (4th Cir. 1971); *Swift* v. *Shop Rite Food Stores, Inc.*, 489 P. 2d 881 (N.M. S. Ct. 1971).

[18]E.g., *Keller* v. *Graphic Systems of Akron*, 422 F. Supp. 1005, 1008 (N.D. Ohio, 1976); IRC Reg. 1.411(a)-4(c), Example 1, 26 CFR 1.411(a)-4(c).

[19]Rev. Rul. 71-92, IRB 71-7, P-H Pension and Profit Sharing ¶65,744; IRS Pub 778, Part 5, P-H Pension and Profit Sharing ¶107,070.

are now prohibited.[20]

—Forfeitures for the inability to locate an employee, formerly permitted,[21] are plainly prohibited by §203(a).[22]

—Forfeitures, or discontinuance, of benefits during any period of post-retirement employment which causes suspension of primary insurance Social Security benefits, formerly permitted,[23] are now clearly prohibited unless falling within the exceptions created by §203(a)(3)(B).[24] See *supra*, at 6-7.

— Signficantly, what defendants would term "benefit adjustments," rather than "cancellation of a participant's claim," for all the foregoing causes, were also formerly permitted,[25] and are now plainly prohibited, see *supra*. Yet defendants' rationale requires them to argue that these latter benefit reductions for misconduct, disloyalty, or competing are not prohibited by §203(a) because the "claim" to the reduced benefit is still retained.

In sum, the propriety of permitting worker's compensation offsets under the Code's antidiscrimination rules is irrelevant to the question before the Court, since these and the new vesting-antiforfeiture rules were both, except as expressly provided otherwise by Congress, to exist fully in their respective spheres, and for very different purposes — the one, to protect Treasury revenues; the other to protect employee retirement

---

[20]*Winer* v. *Edison Brothers Pension Plan*, 593 F. 2d 307 (8th Cir. 1979); *Amory* v. *Boyden Associates*, 434 F. Supp. 671 (S.D. N.Y. 1976); *Lewis* v. *Merrill Lynch, Pierce, Fenner & Smith*, 431 F. Supp. 271 (E.D. Pa 1977); *Fremont* v. *McGraw Edison Co.*, 606 F. 2d 752 (7th Cir. 1979).

[21]Rev. Rul. 70-317, IRB 1970-25, P-H Pension and Profit Sharing ¶65,680

[22]Ways and Means Com. Rep. No. 93-807, 93d Cong, 2d Sess., at 60, reprinted in II Leg. Hist. at 3180; Finance Committee Rep. No. 93-383, 93d Cong., 1st Sess., at 50, reprinted in I Leg. Hist. at 1118.

[23]IRS Pub. 778, Part 5, P-H Pension and Profit Sharing ¶107,070, Rev. Rul. 82, C.B. 1953-1, 288.

[24]*Riley* v. *M.E.B.A. Pension Trust*, 570 F. 2d 406 (2d Cir. 1977).

[25]"Similarly, provision may be made for granting less liberal rights under such circumstances." Rev. Rul 71-92, IRB 71-7, P-H Pension and Profit Sharing ¶65,745; IRS Pub. 778, Part 5, P-H Pension and Profit Sharing ¶107,070.

benefits.[26]

C. Treasury Regulation §1.411(a)-4(a) is unavailing to defendants.

In our initial brief we demonstrated that Treasury Regulation §1.411(a)-4(a) (1977), on which defendants rely, was neither a "legislative regulation" nor one which permitted non-retirement-benefit offsets. Treasury has itself now agreed with the former proposition (U.S. Brief, p. 19, n. 12); and the Sixth Circuit, with the latter.

Particularly in view of Treasury's own renunciation of the deference which defendants would accord its regulation, the regulation must be addressed in terms of its consistency with the statute it interprets. On this basis its purported authorization of benefit reductions "to take into account benefits which are provided under the Social Security Act or under any other Federal or State law," in Regulations §1-401-4(b) and §1.411-4(a) (1977), cannot authorize pension plan benefit reductions for workers' compensation.

Respondent and appellees argue that since Congress made no relevant change in Code §401(a)(5)—under which Rev. Rul. 68-243 was issued — then that section, including the holding of the revenue ruling, was "re-enacted by Congress."

---

[26]Pre-ERISA IRS enforcement of employee benefit plan laws was not for the purpose of protecting employees, but rather to protect the Federal Government against unjustified revenue losses. Thus the Sen. Committee on Labor and Public Welfare, Rep. No. 1440, reprinted at [1958] U.S. Code Cong. & Adm. News at 4137, 4151, in connection with what became the Welfare and Pension Plans Disclosure Act, stated:

> "The regulation of qualified pension plans by the Internal Revenue Service is for income-tax purposes. It does not assure against abuse nor is there any disclosure to the employee-beneficiaries. On the contrary, by law the Internal Revenue Service cannot inform the beneficiary if it finds something wrong with the management of the plan. It can only disqualify the plan which operates to the detriment of the employee-beneficiaries. Under Internal Revenue Code enforcement, abuses or misconduct on the part of the employer-sponsor of the trust can victimize the employee-beneficiary."

Thus, IRS concern was never about pension benefit forfeitures as such, but only whether such benefit reductions tended to discriminate in favor of officers, shareholders and highly compensated employees. Rev. Rul. 70-317, IRB 1970-25, *supra;* Rev. Rul. 71-92, IRB 1971-7, *supra.*

First, as discussed above, Congress added an entire array of new vesting-antiforfeiture standards which plans would thereafter be required to *separately* meet.

Second, the Social Security integration authorized by §401(a)(5) *was* changed, to limit such integration, after the most tortured agonizing by Congress.[27] ERISA §206(b) and IRC §401(a)(15). To infer from this limited, temporary and specific "approval" of Social Security, as defendants claim, that Congress intended to give free rein to every other form of abuse causing reduction or loss of pension benefits is absurd.

Congress, however, was not "silent" about these other forfeiture provisions: all were loudly and clearly prohibited under §203(a). Concurrent with this new prohibition, Congress found it appropriate to place Social Security (and Railroad Retirement) "integration" in ERISA Title II by adding §206(b)[28] to ERISA, providing explicitly for limited Social Security and Railroad Retirement[29] integration. Indeed, if Social Security and similar integration were solely a matter of discrimination, Con-

---

[27]Many legislators opposed Social Security integration, arguing that "lower and middle level workers . . . are in effect eliminated from the private plan" system. See, e.g., House Ways and Means Rep. No. 93-533, reprinted in [1974] U.S. Code, Cong. & Adm. News, *supra*, at 4835-4837 (Supplemental Views of Reps. Gorman and Gibbons); House Ways and Mean Rep. No. 93-807, 93d Cong., 2d Sess, at 69, II Leg. Hist. 3189; II Leg. hist. at 3429-3430 (Rep. Ullman); III Leg. Hist. at 4732 (Sen. Williams).

[28]Contrary to its characterization by defendants as a "benefit" (as distinguished from "vesting"), section §206 of ERISA contains another express exception, in subsection (c), to the nonforfeiture rule of §203(a). This further confirms the artificiality of the distinction which, defendants (but not Congress) seek to make between "claim" and "benefit."

[29]Railroad Retirement Act integration exemplifies defendants' dilemma. Such integration had been permitted administratively by IRS under §401(a)(5) since 1953 as a "retirement benefit created under State or Federal Law." Rev. Rul 61-147. However, Congress for the first time, in ERISA, wrote specific approval of the administrative offset (within limitation) into the law. Its failure to do so with respect to worker's compensation, which defendants also claim is a "retirement benefit created under State or Federal law," confirms Congressional intent not to permit offsets of worker's compensation or any other "retirement benefit created under State of Federal law."

gress need not have bothered to put its limited approval thereof in Title II of ERISA.

Third, it is clear that worker's compensation is not a retirement benefit created under State or Federal law, a qualification which must be read into the regulation, as the Sixth Circuit held. Appellees and respondent do not attempt to explain the stark omission of the word "retirement" from the Treasury Regulation, preferring to rely on whatever explanation is provided by Treasury. Treasury, however — in a startling about-face — defends this omission (Brief, 18, n. 10) by stating, first, that nothing in ERISA affirmatively prohibits worker's compensation offsets; and second, that it is its new 1977 regulation, Section 1.411(a)-4(a) (interpreting Code §411) which controls, not Section 1.401-4(b) (interpreting Code §401) — and significantly that §411, unlike §401, says nothing about "retirement benefits created under State or Federal law."

Apart from the intrinsic illogic of this "reasoning," discussed below, Treasury's position on this issue represents a belated, make-weight rationale which contradicts everything it formerly asserted. Before the Third Circuit, the Department entitled one argument in its *amicus* brief, at 20-28: "C. Worker's compensation benefits are included in 'retirement benefits' within the meaning of Section 401 (a)(5), Title 26." There, criticizing the trial judge for not appreciating the asserted relationship, the Department argued vigorously that there exists a "precise connection between" Code §401 and ERISA §203. (Brief of *amicus* United States to the Third Circuit below, p. 20, n. 7). According to Treasury, "[T]he question then . . . is whether, within the intendment of ERISA, 'retirement benefits' includes worker's compensation benefits."

Thus, as Treasury argued below, the phrase "retirement" benefits *must* be read into the regulations. This is particularly true, as Treasury argued below, in light of the history of the phrase "retirement benefits created under State or Federal law." The phrase was added to the Code by §162(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, which added

§165(a)(5) to the Code.[30] This section eventually became §401(a)(5) of the Code. The amendment was intended to permit the establishment of pension plans designed to supplement retirement benefits under the Social Security program. H.R. No. 2333, 77th Cong. 2d Sess., at 50-51, reprinted at 1943 CCH Standard Federal Tax Service, §1150. In 1943, Treasury Regulation 111 (1939 Code) was issued. §§29.165-3 and 29.165-4 thereof permitted integration with social security or other programs only if it resulted in "an integrated and correlated *retirement* system." (Emphasis added). (In discussing social security, §29.165-3 permitted only "offset by the *retirement* benefits provided."). This requirement is retained in virtually identical language, in Treasury Regulation §1-401-4(b), 26 C.R.F. §1.401-4(b) (1956), which remains in effect today.

Contrary to its urgings below, the Department also implies with considerable hubris that the 1977 regulation, having been issued under Code §411, and not §401, need not pertain only to "retirement" benefits created under Federal or State law. This is nonsensical, as Code §411 (like ERISA §203) contains no exception to its vesting and nonforfeiture requirements for *any* public benefits, including social security. To the extent that there is any authority under Code §411 and ERISA §203 for offsets for worker's compensation or other public benefits, defendants and heretofore Treasury itself (Brief, 14-16) have consistently contended that it derives from practices and regulations under §401 and Congress' asserted approval of them.[31]

Appellees and respondent cite many district court cases up-

---

[30]"(5) A classification shall not be considered discriminatory within the meaning of paragraphs (3)(B) or (4) of this subsection merely because it includes employees the whole of whose remuneration constitutes 'wages' under section 1426(a)(1) (relating to the Federal Insurance Contributions Act). . . . Neither shall a plan be considered discriminatory within the meaning of such provisions . . . merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from 'wages' by section 1426(a)(1) . . . differ because of any *retirement* benefits created under State or Federal law." (Emphasis added.)

[31]Indeed, appellees argue that the 1977 Treasury regulation "harmonizes" the various ERISA provisions. (Brief, 30-31).

holding the Treasury Regulation. But a careful review of *all* of the opinions of the district court judges reveals that in *every* case where the Court scrutinized the regulation, it invalidated its application as permitting worker's compensation offsets.[32] As Judge King concluded in *Employee Benefits Comm, supra:* "To include workers' compensation benefits within the 'integration' of benefits provided for under section 405(a)(5), one would have to ignore the nature of workers' compensation." (Slip Op., 18). In clear contrast, each district court opinion permitting worker's compensation did so blindly, following the raised Treasury regulation without the slightest scrutiny. Indeed, in *Pavlovic* and *Dotson* (and perhaps *Carlson*), disability rather than normal retirement benefits were the subject of the offset.

Plainly, the Sixth Circuit and the district courts which rejected the application of the Regulation to worker's compensation offsets were correct.[33]

---

[32]See *Utility Workers* v. *Consumers Power Co., supra, aff'g,* 453 F. Supp. 447 (1978); *Stong* v. *Bucyrus-Erie, supra;* and the district court decisions in *Buczysnki* and *Alessi.* For the latest such case, see *Employee Benefits Committee of the Retirement System of Hawaiian Telephone Co.* v. *Pascoe, supra.*

[33]The pre-ERISA state cases cited for worker's compensation offsets (Brief of respondent, 37, n. 52; brief of appellees, 25-26, n. 25) say nothing more than that the worker's compensation public policy of a jurisdiction is not violated by offsetting worker's compensation against pension benefits. (Contrary to respondent, *Paterson* v. *Southwestern Bell Telephone Co.,* 411 F. Supp. 79 (E.D. Okla. 1976) and *Fultz* v. *Union Carbide Corp.,* 219 Tenn 345, 409 S.W. 2d 541 (1966), cited by respondent at Brief, 37, n. 52, did not involve offsets against a pension plan's retirement benefits, but rather against disability benefits, respectively.) At least two cases reject even this holding, *Employee Benefits Committee* v. *Pascoe, supra; Massey* v. *D.C. Transit Sys., Inc.,* 338 F. 2d 584 (C.A.D.C. 1967) (Federal Longshoremen's and Harbor Worker's Compensation Act, 33 USC §915). Further, the holding to the same effect in *Renshaw* v. *U.S. Pipe & Foundry Co.,* 30 N.J. 458, 153 A. 2d 673 (1959), *specifically* moved the New Jersey legislature to repudiate it and enact the law expressly prohibiting such offsets.

Defendants significantly omit mention of the one surviving proposition of *Renshaw* regarding the nature of New Jersey worker's compensation:

> "The New Jersey theory is that liability or its extent is not based on the impairment or loss of earning power, but rather the loss ensuing from personal injury as it detracts from the former efficiency of the workman's body or its members in the ordinary pursuits of life." *Id,* at 465.

(Continued)

D. Defendant's other arguments are without merit.

Among defendants' many other arguments to which space and time limitations preclude a reply, only two need be noted.

A general theme which pervades the several defense briefs, and urged explicitly by *amicus* U.S. Chamber of Commerce (Brief, pp. 16-17), is that the present plan provisions were agreed to, or resulted from, "collective bargaining" and are a part of a "total compensation package" "negotiated" by the defendant employers and unions representing plaintiffs.

The first and most fundamental answer, as appellants themselves well know (Brief, p. 29), is that private agreements cannot override the congressional mandate but are subordinate to it. *Utility Workers Union of America* v *Consumers Power Co.*, *supra*, Slip Op. p. 12. Indeed, the "Pension Reform Act" was enacted precisely to overrule private agreements and abuses to the contrary, *cf. Nachman Corporation* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980).

Second, there is absolutely no evidence in either consolidated case that the worker's compensation offsets in issue were ever the subject of a "trade-off."[34]

With respect to economic arguments, the briefs of respondent and certain *amici* are replete with extravagant statements as to the purported cost of a disallowed worker's compensation offset, indeed to the point of a suggested threat to "the stability and continued existence of such plans." (Brief of respondent, p. 23, n. 33).

In the first place, of course, the cost is legally irrelevant,

---

Finally, apart from not being "retirement" benefits, in no sense is worker's compensation a "public benefit," financed as it is not by taxes, but by employer contributions or premiums, a distinction recognized in *Richardson* v. *Belcher*, 404 U.S. 83, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971). See also the Sixth Circuit's analysis in this regard.

[34]In fact, the record evidence showed that there was no G.M. offset provision between 1964 and 1970. The record does not show, but appellants understand the fact to be that General Motors did not apply its offset to petitioners until 1977.

bearing no more upon a proper resolution of the issues before the Court than was the unanticipated cost to the employer in *Nachman*, or would be, in a suit testing their validity, the cost of the eligibility, vesting and funding provisions of ERISA generally.

With reference to the cost of worker's compensation offsets, specifically, the only economic data available are set forth in the Brief of Appellants at p. 19, n. 15, indicating *inter alia*, that the estimated number of affected pension plans is only 8.5% of all defined benefit plans, that the estimated number of affected claimants throughout the nation is but 2,000 per year or 0.006% of all plan participants, and that the anticipated increase in annual pension plan contributions would involve only 0.22% to 0.24% of current pension costs. Despite the dissenting opinion in *Utility Workers*, the only record evidence therein indicated that the cost was actuarially insignificant and not factored into plan design.

The ultimate economic realty is not that there is a threat to the stability of any retirement plan by effectuating the congressional intent of §203(a), but a windfall to affected employers in non-payment of deferred compensation to their employees if the offset is allowed. Whatever the cost is, it is realistically a matter of redistibution to other plan participants but at most *de minimis* as to them; while as to affected claimants, a matter almost literally of survival.

II.
THE PREEMPTION ARGUMENTS OF APPELLEES, RESPONDENT AND THEIR *AMICI CURIAE* ARE WITHOUT MERIT.

The Briefs of appellees, the Government and their *amici* are remarkable in that they do not even acknowledge, much less distinguish the very section of ERISA which excepts worker's compensation laws from the general preemption section of the Act — as a recent decision squarely holds.

Thus, although §514(a), 29 U.S.C. §1144(a), provides that, "except as provided in subsection (f) of this section, the provi-

sions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a)," the sentence concludes by stating, *"and not exempt under section 4(b)."* (Emphasis added).

Section 4(b)(3), 29 U.S.C. §10003(b)(3), in turn, expressly excepts from the coverage of the Act "any employee benefit plan if . . . (3) said plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws."

On authority of that plain exception to the general preemption rule of the Act, the Court in *Employee Benefits Committee of the Retirement System of Hawaiian Telephone Company* v *Pascoe*, ____ F. Supp. ____, No. 78-0483 (D. Hawaii, December 15, 1980), has just ruled that, "The clear policy of the State of Hawaii to prevent employers from taking any action to reduce their obligations to pay workers' compensation benefits bars any relief declaring that the [retirement plan's workers' compensation] offset is valid," (Slip Op, 25-26). "Any possible issue of federal pre-emption of ERISA of the State workers' compensation law is precluded by the language of ERISA." *Id*, Slip Op, 31, n. 26, citing §§514(a) and 4(b)(3).

Respondent G.M.'s argument that the General Motors plan is not *itself* a §4(b)(3) plan "maintained solely for the purpose of complying with applicable workmen's compensation laws" begs the question. It is the New Jersey *law* which is exempted from preemption under §4(b)(3), and consequently its terms prevail over plan provisions to the contrary. Obviously, if a plan which is designed to "comply with [an] applicable workmen's compensation law" is not preempted by ERISA, then *a fortiori* the underlying statute with which such plan is permitted to comply equally escapes coverage.[35]

---

[35]G.M. also erroneously characterizes appellant's argument as being that the New Jersey workmen's compensation law is exempt from preemption because it does not relate to pension plans "*qua* pension plans." That is not appellants' argument, and the characterization is gratuitous.

This analysis was adopted in another recent decision cited by Respondent. Although the District Court in *Standard Oil Company of California* v. *Agsalud*, 442 F. Supp. 965 (N.D. Cal. 1977), affirmed 633 F. 2d 760 (9th Cir, 1980), held that Hawaii's Prepaid Health Care Act was preempted by ERISA, it expressly distinguished the worker's compensation and other exceptions of ERISA. Tracing the legislative history of §4(b)(3) of ERISA to §(b)(2) of the former Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 ("WPPDA"), 29 U.S.C. §303(b)(2), 442 F. Supp. 699, the Court concluded that, "In ERISA, Congress has said that all state laws relating to private employee benefit plans are pre-empted *except workmen's compensation, unemployment compensation, and disability insurance laws.*" At 698. (Emphasis added.) "Congress intended in ERISA to standardize the law governing employee benefit plans. It nevertheless permitted the states to continue to enforce their workmen's compensation, employment compensation, and disability insurance laws although those laws very substantially from state to state. *Mere incantation of the congressional goal of uniformity in regulation cannot resolve this question of statutory construction.*" At 706. (Emphasis added). "The inclusion of §4(b)(3) demonstrates that Congress was willing to sacrifice its goals of uniformity and minimum protection to substantive state interests." At 709.

It is all well and good to talk about the conceded expansive preemption language and intent of Congress in ERISA. It is quite another to disregard the explicit Congressional language and intent to exempt certain traditional social insurance laws such as worker's compensation. Although Congressman Dent spoke of the preemption clause as being "to many the crowning achievement of this legislation" — as several of the adversary briefs are quick to point out — it is important to recall that he concluded that statement by carefully asserting that preemption applies only to employee benefit plans "as described in section 4(a) *and not exempt* under section 4(b)." 120 Cong. Rec. 29197, 93d Cong. 2d Sess. (1974), III Leg. Hist., at 4671.

(Emphasis added). The New Jersey Workers' Compensation law is not preempted.

CONCLUSION

For the foregoing reasons appellants renew their prayer for relief, for reversal of the decision below.

Respectfully submitted,
MICHAEL S. SCAROLA,
GELMAN & GELMAN,
Counsel for Appellants
45 Church Street
Patterson, New Jersey 07505
(201) 523-8050

THEODORE SACHS
I. MARK STECKLOFF
MARSTON, SACHS, NUNN, KATES,
KADUSHIN & O'HARE, P.C.
Of Counsel
1000 Farmer
Detroit, Michigan 48226
(313) 965-3464